Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court Of The United States

OCTOBER TERM 1978

NO. 79-418

LINCOLN SCHOOL
DISTRICT NO. 48 ..... **Petitioner**

VS.

RAY MARSHALL, SECRETARY
OF LABOR, UNITED STATES
DEPARTMENT OF LABOR ..... **Respondent**

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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IN THE

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NO.....

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DISTRICT NO. 48 ..... **Petitioner**

VS.

RAY MARSHALL, SECRETARY
OF LABOR, UNITED STATES
DEPARTMENT OF LABOR ..... **Respondent**

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Lincoln School District No. 48, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in **Marshall vs. Lincoln School District No. 48,** on June 7, 1979.

OPINIONS BELOW

The opinion of the United States District Court, Western District of Arkansas, Fayetteville Division, in **Marshall vs. Lincoln School District No. 48,** on October 24, 1978, is reproduced at Appendix II hereto, page 12, infra. The opinion of the United States Court of Appeals for the Eighth Circuit, entered on June 7, 1979, is reproduced at Appendix IV hereto, page 19, infra.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on June 7, 1979. A petition for rehearing was filed by Lincoln School District No. 48 on June 20, 1979, which is reproduced at Appendix VI hereto, page 24, infra. Petition for Rehearing was denied on June 28, 1979, staying the period for filing said Petition for Writ of Certiorari for eight days. This Court has jurisdiction under 28 U.S.C. §1254 (1) and 28 U.S.C. §2101 (c).

QUESTION PRESENTED

The United States District Court, Western District of Arkansas, Fayetteville Division, in ruling the decision of Lincoln School District No. 48, not to rehire four employees was not a violation of 29 U.S.C. §215 (a) (3), found that the overwhelming preponderance of the evidence clearly showed that no member of the school board acted in violation of 29 U.S.C. §215 (a) (3), without determining whether the school board members had knowledge that the four dismissed employees had filed a letter of complaint with the Wage and Hour Division of the Department of Labor, prior to their decision not to renew the employees' contracts. The United States Court of Appeals for the Eighth Circuit reversed, finding the sole reason given by the District Court for its decision was the financial condition of the cafeteria that resulted in the school board reducing the number of workers in the cafeteria, which was clearly erroneous in that replacements were hired for the four employees that were dismissed. The Court of Appeals did not determine whether the school board members had knowledge of the four employees' letter of complaint to the Wage and Hour

Division of the Department of Labor, before their decision not to renew the employees' contracts. The question presented is:

(1) Whether there can be an unlawful discharge in violation of 29 U.S.C. §215 (a) (3), discriminating against an employee because such employee filed a complaint or instituted any proceeding relating to the Fair Labor Standards Act of 1938, when the employer had no knowledge that the discharged employee had filed a complaint or instituted a proceeding at the time of the decision not to renew the contract of such employee.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Fair Labor Standards Act of 1938, as amended in Title 29 U.S.C. §215 (a) (3) which is reprinted at Appendix VIII hereto, page 26, infra.

STATEMENT OF THE CASE

During the 1974-1975 school year, the lunchroom program at the Lincoln School District was fraught with considerable problems. There was dissension and friction among the employees and refusals by the employees to carry out many of the administrative policies promulgated for the lunchroom. (TR. 162-163, 182-183, 176, 159, 142). Throughout the school year, the problem was of such a serious nature that the school board was preoccupied with lunchroom at almost every school board meeting. (TR. 157). Due to these problems with the lunchroom, special meetings were held with the lunchroom employees. (TR. 159). The school board had to request state assistance to help them analyze their prob-

lem and attempt to come to conclusions, to assist them in developing a successful lunchroom. (TR 157).

The financial condition of the lunchroom program was extremely poor and the board members attributed the condition to the refusal of the employees to carry out the school policies (TR 134, 159, 169), such as the improper use of school commodities and the demand of the employees for more student workers than were necessary. (TR. 134, 158, 162).

On February 18, 1976, a letter of complaint was sent to the Wage and Hour Division of the Department of Labor. (TR. 21-22). All seven cooks employed by the Lincoln School District signed the letter of complaint and assented to the language of the letter. (TR. 30, 87). As a result of the letter of complaint, the Wage and Hour Division of the Department of Labor investigated the Lincoln School District and determined that back wages were due and owing to all of the lunchroom employees, which was promptly paid to these employees in full by the Lincoln School District. (TR. 102).

The Lincoln School District issued one-year contracts to each of the seven lunchroom employees, which expired at the end of each school year. (TR. 70, 85, 119, 124, 142). Four of the seven lunchroom employees' contracts were not renewed at the end of the 1974-1975 school term upon the recommendation of the school superintendent and in the best judgment of the school board. (TR. 125). The school board took into consideration the financial problems of the lunchroom, the lack of cooperation among the cook personnel, the complaints about student workers and the fact that the lunchroom was running low on money due to the failure to make proper use of the commodities that were available, all

evidenced by the financial records and information from the superintendent. (TR. 134-135). No school board member knew that the seven cooks had filed a letter of complaint with the Wage and Hour Division of the Department of Labor until after the school board had made its decision not to renew four of the seven cooks' contracts. (TR. 91, 95-96, 125, 129-30, 133-134, 138, 143, 153, 161-162).

The Wage and Hour Division of the Department of Labor thereafter filed this litigation, alleging a violation of 29 U.S.C. §215 (a) (3), thereby conferring jurisdiction in the United States District Court.

The United States District Court for the Western District of Arkansas, Fayetteville Division, in finding no violation of 29 U.S.C. §215 (a) (3), stated:

"The cost of operating the cafeteria was so great that it was a matter of grave concern to the school board throughout the term and so great that the board had to request state assistance to operate the cafeteria the latter part of the school term. The board was also faced with dissension and friction among the cafeteria employees."

In concluding, the District Court further states:

"Under the total circumstances of this case we find that regardless of whether the school board members were aware of the role the four ladies played in the Wage and Hour dispute each board member had not only the right, but also the obligation to exercise his vote for the best interest of the school district so long as he did not act in violation of §215 (a) . . . . we specifically find that no member of the board acted in violation of §215 (a) . . . ."

On appeal, it was conceded that the District Court

erred in finding that "the school has not replaced the four cooks whose contracts were not renewed . . . ."

The United States Court of Appeals for the Eighth Circuit, reversed and remanded the case with directions that an appropriate reinstatement and back pay order be entered, finding that "the sole reason given by the [District] court for this conclusion was that the school cafeteria operated at a financial loss and as a result the board decided to reduce by four the number of cooks working in the cafeteria," which was "clearly erroneous."

The Court of Appeals in its opinion on June 7, 1979, nor the District Court in its opinion on October 24, 1978, determined whether the school board members had knowledge of the employees letter of complaint to the Wage and Hour Division of the Department of Labor, prior to their decision not to renew the contracts of four employees.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The Department of Labor initiated the present proceeding alleging a violation of 29 U.S.C. 215 (a), which is as follows:

> . . . . It shall be unlawful for any person . . . . (3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter.

Section 15 (a) (3) outlaws any discrimination by employers in retaliation against employees who register wage and hour complaints with the United States De-

partment of Labor. The burden is on the employee throughout to make out his case by a preponderance of the evidence. **Mornford vs. Andrews,** 151 F. 2d 511 (5th Cir. 1945); **Brennan vs. Braswell Motor Freight Lines, Inc.,** 396 F. Supp 704 (N.D. Tex. 1975).

The United States District Court for the Western District of Arkansas, Fayetteville Division, held that the employees had established a prima facie case of discrimination under 29 U.S.C. §215 (a) (3) but the preponderance of the evidence clearly showed that no member of the school board acted in violation of 29 U.S.C. §215 (a) (3) without determining whether the school board members had knowledge of the four dismissed employees' participation in the wage and hour dispute before their decision not to renew their contracts.

The United States Court of Appeals for the Eighth Circuit, found that in light of the findings of fact made by the District Court, there was no credible evidence to rebut the prima facie case of retaliation in violation of 29 U.S.C. §215 (a) (3).

The Court of Appeals, in refusing to remand the case to the District Court for further consideration, failed to recognize that the District Court's decision was made without a determination and regardless of whether the school board members were aware that the employees had filed a letter of complaint with the Wage and Hour Division of the Department of Labor, prior to their decision not to renew their contracts.

It is undisputed that where the immediate cause or motivating factor of a discharge of an employee is the employee's assertion of statutory rights under the Fair Labor Standards Act of 1938, the discharge is discrim-

inatory under 29 U.S.C. §215 (a) (3). **Brennan vs. Maxey's Yamaha, Inc.,** 513 F. 2d 179 (8th Cir. 1975).

In determining whether the immediate cause or motivating factor of the discharge was the assertion of statutory rights by the employee, the Courts' determination is centered around the knowledge of this assertion by the party discharging such employee. **Marshall vs. Mandel's, Inc.,** 23 WH Cases 980 (E.D.N.Y. 1978); **Brennan vs. Zager,** 22 WH Cases 323 (M.D. Tenn. 1975), Aff'd 529 F. 2d 524 (6th Cir. 1977); **Brennan vs. Maxey's Yamaha, Inc.,** supra; **Wirtz vs. C.H. Valentine Lumber Co.,** 236 F. Supp 616 (E.D. S.C. 1964); **Mitchell vs. Goodyear Tire and Rubber Co.,** 278 F. 2d 562 (8th Cir. 1960); **Mitchell vs. Dyess,** 180 F. Supp 852 (S.D. Ala. 1960); **Mitchell vs. Demario Jewelry, Inc.,** 180 F. Supp 800 (M.D. Ga. 1957), Aff'd 361 U.S. 288 (1959); **Meek vs. United States,** 136 F. 2d 679 (6th Cir. 1943).

The United States Court of Appeals for the Eighth Circuit in **Mitchell vs. Goodyear Tire and Rubber Co.,** supra., held that:

"Since these facts unambiguously and admittedly show that [the employer] **would not have been discharged** at that particular time **but for his admission of authorship** of the letter of complaint, this evidence, per se, establishes a violation of the plain terms of §15 (a) (3) . . ." 278 F. 2d 562 at 565. (Emphasis added).

The United States District Court in **Marshall vs. Mandel's Inc.,** supra, further stated:

"It is clear, however, that the discharge of an employee solely for sufficient disciplinary or economic reasons unrelated to any assertion of statutory rights or **without knowledge of any such assertion** is not a violation of section 15 (a) (3)." 23 WH Cases 980 at 983.

In light of these cases and 29 U.S.C. §215 (a) (3), the discharge of an employee by an employer who has no knowledge of the assertion of any statutory right by such employee can not be an unlawful discrimination against that employee because he exercised this statutory right.

Therefore, the Petitioner respectfully submits that the United States Court of Appeals for the Eighth Circuit erred in refusing to remand the case to the District Court for a determination as to whether the school board members of Lincoln School District had either express or implied knowledge of the employees' letter of complaint prior to their decision not to renew the employees' contracts.

CONCLUSION

For the foregoing reasons it is submitted that a Writ of Certiorari should issue to review the June 7, 1979, decision of the United States Court of Appeals for the Eighth Circuit.

Respectfully Submitted
Lincoln School District No. 48

By .....
Walter R. Niblock
Niblock & Odom
P.O. Drawer 818
Fayetteville, Arkansas 72701
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, Walter R. Niblock, attorney for the Petitioner, state that I have caused to be deposited in the U.S. Mails, postage prepaid, a true and correct copy of the above and foregoing to Carin Ann Clauss, Donald S. Shire, Lois G. Williams, Gregory J. O'Duden, Paul X. Williams, Donald P. Lay, Gerald W. Heaney, and Edward J. Devitt, on this .....12th..... day of September, 1979.

/s/ Walter R. Niblock

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

RAY MARSHALL, Secretary of Labor,
United States Department of Labor, ...**Plaintiff,**

vs. Civil No. F-76-5-C

LINCOLN SCHOOL DISTRICT NO. 48, ...**Defendant.**

ORDER

Pursurant to Memorandum Opinion filed herein, and in accordance therewith,

IT IS ORDERED AND ADJUDGED that the above-styled action should be and hereby is dismissed with prejudice, with costs to be adjudged against the Plaintiff.

This 24th day of October, 1978.

/s/ PAUL WILLIAMS,
United States District
Judge

Filed October 24, 1978.

APPENDIX II

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

RAY MARSHALL, Secretary of Labor,
United States Department of Labor, ... **Plaintiff**

vs. NO. F-76-5-C

LINCOLN SCHOOL DISTRICT NO. 48 .... **Defendant**

OPINION

This is an action by the Secretary of Labor to enjoin Lincoln School District No. 14 (sic) from violating the Fair Labor Standard Act, 29 U.S.C. 201 et seq. and more particularly 29 U.S.C. 215 (a) and alleging that the defendant School District unlawfully discharged four cooks at the school cafeteria in retaliation for the exercise of their rights to minimum wages and overtime.

Trial to the Court was held on January 24, 1978. After conclusion of all evidence attorneys requested and were granted time to file briefs. Briefs have been submitted and the case is ready for decision. The facts are not substantially in dispute.

During the 1974-1975 school year Lincoln School District No. 14 (sic) employed eight lunchroom workers, one of whom was designated as the supervisor. The cost of operating the cafeteria was so great that it was a matter of grave concern to the school board throughout the term and so great that the Board had to request State

assistance to operate the cafeteria the latter part of the school term. The board was also faced with dissention and friction among the cafeteria employees.

In February, 1975, four of the cooks decided that they were being denied minimum wages and overtime pay guaranteed by the Fair Labor Standard Act. Mrs. Gladys Albright, Mrs. Beverly Barker, Mrs. Doris Danforth and Mrs. Beverly Attebury composed a letter to the Department of Labor and had it typed. They then presented the letter to the other cafeteria employees and all signed it except for the supervisor.

In response to the letter, the Labor Department investigated the complaints and presented findings to the school board.

On May 13, 1975, the school board voted to pay all the cooks back wages in the sums which the department had found was due.

At the same time the board decided to change its policy and manner of operating the cafeteria to bring it within the finances of the school and to effect a better and more efficient mode of operation. It voted to stagger the lunch times of its students and to employ three cooks instead of seven. In exercising its judgment as a school board and on the recommendation of the school superintendent it voted to re-employ three of the cooks who were experienced and to not offer re-employment to the other four who were Albright, Danforth, Attebury and Barker.

The four promptly reported the failure to re-hire them and caused the Department of Labor to initiate the present proceeding alleging a violation of 29 U.S.C. §215 (a) which is as follows:

> . . . It shall be unlawful for any person . . . (3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter . . .

The burden of proving a violation of this section is on the plaintiff, the Secretary of Labor. **Brennan vs. Braswell Motor Freight Line, Inc.,** 396 F. Supp 704 (N.D. Tex. 1975). The Secretary has presented evidence to show that the four cooks were the initiators of the wage and hour investigation and that the school board voted not to renew their contracts at the same meeting when back pay was awarded to all seven cooks. We therefore find established a prima facie case of discrimination under 29 U.S.C. §215 (a) and that the defendant school district has the burden to show that the action of the board was not retaliatory in violation of §215 (a).

We find that the defendant has carried its burden of proof. In doing so we note that the obligation to make decisions on the hiring of school cafeteria personnel is on the School Board. The fact that the Superintendant of schools recommended the hiring of the three who were hired is a circumstance which the Board members properly considered, but the responsibility for the board's action belongs to the board and the school board members. We note that school board members serve without pay and that their selection is by popular vote. The manner in which they exercise their voting prerogative is largely a matter of honor and integrity, although it has been held that in a proper case the Board Members can be held liable in damages for their vote and actions. See **Wood vs. Strickland,** 420 U.S. 308 (1975).

In the case at bar the board was selecting three out of the seven cooks. Since all seven had filed with the Department of Labor, any one of them not employed could be expected to feel that she had been the victim of retaliation, but the totality of circumstances compels the Court to conclude that the school satisfactorily proved that the hiring of the three who were employed was the result of the exercise of good judgment by the board and in no manner retaliatory or in violation of §215 (a). Another circumstance highly persuasive to the Court is that the cafeteria is on a sound financial basis now and Superintendant Wiley is pleased with the fact as well as with the complete cooperation of the three cooks who were hired. We are convinced from the evidence and specifically find that due to the fiscal problem of the cafeteria, the board had investigated cafeteria systems of other schools nearby in hope of adopting some cost saving procedures, and had decided to serve meals in several shifts during the 1975-1976 school term and to make menu changes so that the cafeteria could be operated with fewer employees. When the time came to renew contracts, the board acted on its previously formulated plan and renewed the contracts of only four kitchen employees: three cooks and the supervisor. This reduced the kitchen staff by half. The school has not replaced the four cooks whose contracts were not renewed, as the new procedures have proved both efficient and satisfactory as well as staying within the school budget.

The defendant's proof shows that the board voted to hire the particular three cooks on the recommendation of the school superintendant who had the recommendation of the supervisor, Mrs. Cheatham that the three be hired. We note that Mrs. Cheatham did not suggest or

recommend that anyone be "not hired." She suggested that three could carry out the proposed new plan and that the three who were re-hired were capable of doing the required work.

The plaintiff offered evidence that Mmes. (sic) Albright, Attebury, Barker and Danforth had never disobeyed directions or school policies. We find that the four had been good employees but since the board had decided to reduce the kitchen staff by one-half the board was not deciding who was a good or bad employee, but who would be the better employee for the 1975-1976 term for this particular school. The Superintendant's recommendations related only to the issue of which three were the better employees for the defendant school district.

Under the total circumstances of this case we find that regardless of whether the school board members were aware of the role the four ladies played in the wage and hour dispute, each board member had not only the right, but also the obligation to exercise his vote for the best interest of the school district so long as he did not act in violation of §215 (a).

We specifically find that the preponderance of the evidence shows clearly that no member of the board acted in violation of §215 (a), but on the contrary advised with his fellow board members, considered the entire situation and exercised his best judgment by his vote.

We also find that the Congress did not intend to require a school to offer employment permanently to a cafeteria employee in all instances where an employee

filed a claim for wage and hour discrimination and the Secretary finds that there has been a violation. Congress intended only what §215 (a) plainly states and that is that no person shall discharge or in any manner discriminate against an employee because the employee has filed a proceeding under the Fair Labor Act. We specifically find that the defendant school had a duty to stay within its budget. When the defendant found that the cafeteria was exceeding the budget the school board had a duty to look into the matter and try to work out a plan that was appropriate for the Lincoln school.

We find that the plaintiff's complaint and petition in this case should be dismissed with prejudice at the cost of plaintiff.

Should this court have reached a conclusion that the four cooks had to be re-hired or paid damages under the circumstances of the case we would have been reaching the ludicrous result of finding that each employee whose employment is at stake because of a re-organization or general reduction of employees could preserve his right to permanent employment by filing and finally winning a wage and hour complaint. Such was not the intent of the Act.

The Clerk will prepare an order dismissing plaintiffs complaint as hereinabove stated.

Dated: October 24, 1978.

/s/ PAUL X. WILLIAMS

Filed October 24, 1978.

APPENDIX III

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

RAY MARSHALL, Secretary of Labor,
United States Department of Labor, ... **Plaintiff**

vs. Civil No. F-76-5-C

LINCOLN SCHOOL DISTRICT NO. 48, ... **Defendant**

NOTICE OF APPEAL

Notice is hereby given that the Secretary of Labor, plaintiff above named, hereby appeals to the United States Court of Appeals for the Eighth Circuit from the final judgment entered of record in this action on the 24th day of October, 1978.

This 18th day of December, 1978.

CARIN ANN CLAUSS
Solicitor of Labor

JAMES E. WHITE
Regional Solicitor

HERIBERTO DE LEON,
Counsel Employment
Standards

/s/ By George K. Weber,
Attorney
Attorneys for Plaintiff

Filed December 22, 1978.

APPENDIX IV

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
NO. 79-1004

RAY MARSHALL, Secretary of Labor,
United States Department of Labor ..... **Appellant,**

vs.

LINCOLN SCHOOL DISTRICT NO. 48 ..... **Appelle.**

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF ARKANSAS

Submitted: May 16, 1979
Filed:: June 7, 1979

Before LAY and HEANEY, Circuit Judges, and DEVITT,* District Judge

*Edward J. Devitt, Chief Judge, District of Minnesota, sitting by designation.

LAY, Circuit Judge.

The Secretary of Labor brought suit in the district court for the Western District of Arkansas to enforce the retaliatory discharge provision under Section 15 (a) (3) of the Fair Labor Standards Act, 29 U.S.C. §215 (a) (3), for an alleged retaliatory discharge of four employees of the Lincoln School District. The district court

found in favor of the School District on the ground that although the Secretary had made a prima facie case, the discharge was nonetheless proven to be based upon economic justification. We reverse.

The facts as found by the trial court are largely undisputed. In February of 1975 four of the seven cooks employed by Lincoln School District No. 48 composed a letter to the Department of Labor inquiring about their right to overtime compensation under the Fair Labor Standards Act. They then presented the letter to the three other cooks for their signatures. After all had signed, the letter was sent to the Wage and Hour Division of the Department of Labor. The Labor Department investigated the complaint and determined that the School District owed the seven cooks back wages. During its May 13, 1975, meeting the school board was apprised of the Labor Department's finding and voted to pay all seven cooks the back wages found due. At the same meeting the board, on the recommendation of the school superintendant, voted not to offer reemployment to the four cooks who had instigated the wage complaint. The four promptly reported the School District's failure to rehire them to the Department of Labor. This action was then commenced alleging a violation of 29 U.S.C., §215 (a) (3).

Section 215 (a) (3) reads in pertinent part:
(It shall be unlawful for any person —
. . . . . .

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter. . . .
29 U.S.C. §215 (a) (3).

After hearing the evidence the trial court ruled the Secretary had established a prima facie showing that the School District refused to rehire the four cooks in retaliation for their role in initiating the wage and hour investigation. After recounting the Secretary's evidence that the four cooks "had never disobeyed direction or school policies," the court specifically found "that the four had been good employees." Neither of the parties assert that these finding are clearly erroneous.

Notwithstanding the above findings, the district court found that the school district had sustained its burden to show that the board's action was not retaliatory. The sole reason given by the court for this conclusion was that the school cafeteria operated at a financial loss and as a result the board decided to reduce by four the number of cooks working in the cafeteria. Thus, the court explained the board's actions as follows:

> When the time came to renew contracts, the board acted on its previously formulated plan and renewed the contracts of only four kitchen employees: three cooks and the supervisor. This reduced the kitchen staff by half. **The school has not replaced the four cooks whose contracts were not renewed,** as the new procedures have proved both efficient and satisfactory as well as staying within the school budget. (Emphasis added.)

We find that this ruling, as conceded by the School District on appeal, is clearly erroneous. It is undisputed on the record that four replacement cooks **were** hired. All parties agree, and the record unequivocally establishes that seven full-time cooks were employed by the school district during the 1975-1976 school year.

The school district urges that we remand this case to the district court for further consideraton. However, in light of the other fact findings made by the trial court, we find further proceedings unnecessary. The district court found that the board's contemporaneous decisions to pay the cooks back wages and not hire the instigators of the wage complaints gave rise to a prima facie case of retaliation in violation of 29 U.S.C. §215 (a) (3). We cannot say that this finding was clearly erroneous. **See Brennan vs. Maxey's Yamaha, Inc.,** 513 F. 2d 179, 181-83 (8th Cir. 1975); **Mitchell vs. Goodyear Tire & Rubber Co.,** 278 F. 2d 562, 565 (8th Cir. 1960). There exists no credible evidence to rebut the Secretary's prima facie case.

The School District urges an alternative defense that the cooks were allegedly causing "morale problems" in the school cafeteria. However, as previously noted, the district court found that the four cooks were "good employees." The School District also alleges that "financial problems" necessitated the cooks' non-renewal. But since replacement cooks were hired, no financial benefit arose from the failure to rehire the four original cooks. Indeed, the only distinguishing characteristic common to all four cooks is that they instigated the submission of a wage complaint to the Department of Labor.

Accordingly, the judgment of the district court is reversed and the cause remanded with directions that an appropriate reinstatement and back pay order be entered.

A true copy.

Attest:
CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

Filed June 7, 1979.

APPENDIX V

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 79-1004 September Term, 1978

RAY MARSHALL, Secretary of Labor,
United States Department of Labor, ...**Appellant,**

vs.

LINCOLN SCHOOL DISTRICT NO. 48 .....**Appellee.**

APPEAL FROM THE

UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF ARKANSAS

This cause came on to be heard on the original designated record of the United States District Court for the Western District of Arkansas and briefs of the respective parties and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjuded by this Court that the judgment of the said District Court in cause be and the same is hereby reversed.

And it is further ordered by this Court that this cause be and is hereby remanded to the said District Court for proceedings consistent with this Court's opinion.

June 7, 1979

Costs taxed in favor of Appellant:
Costs of preparation of five copies of Brief: $60.00
Costs of preparation of five copies of Brief: $24.00
Total costs of Appellant for recovery from
Appellee in the U.S. District Court: $84.00
A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

July 9, 1979

Filed July 11, 1979.

APPENDIX VI

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RAY MARSHALL, Secretary of Labor,
United States Department of Labor, ...**Appellant**

vs. NO. 79-1004

LINCOLN SCHOOL DISTRICT NO. 48 .....**Appellee**

PETITION FOR REHEARING

Comes now the Appellee, Lincoln School District No. 48, pursuant to Rule 40 of the Federal rules of Appellate Procedure, and for its Petition for Rehearing of the above styled case, states and alleges as follows:

(1) The United States Court of Appeals for the Eighth Circuit in finding that the sole reason given by the

District Court for the Western District of Arkansas for its decision was the financial loss of the cafeteria resulting in the school board reducing the number of workers in the cafeteria, overlooked the fact that the District Court found that the cafeteria was having not only financial problems but also dissension and friction among the cafeteria employees.

(2) The Court of Appeals further overlooked the fact that the District Court found no need to make a determination as to whether the school board members had knowledge of Appellant's participation in the wage and hour dispute, before their determination not to renew the Appellant's contracts.

(3) The Petitioner requests this matter be heard en banc.

WHEREFORE, the Appellee prays that the Petition for Rehearing be granted and that said rehearing be en banc, and upon rehearing the District Court be affirmed.

LINCOLN SCHOOL
DISTRICT NO. 48,

Appellee
/s/ Walter R. Niblock of
NIBLOCK AND ODOM
Its Attorneys
Drawer 818
Fayetteville, AR 72701

Filed June 20, 1979.

APPENDIX VII

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1004 September Term, 1978

RAY MARSHALL, etc., ...**Appellant,**

LINCOLN SCHOOL DISTRICT NO. 48, ...**Appellee.**

APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF ARKANSAS

The Court having considered petition for rehearing en banc filed by counsel for appellee and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

June 28, 1979

Filed June 28, 1979.

APPENDIX VIII

29 U.S.C. §215 (a) . . . it shall be unlawful for any person ..... (3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this act (29 U.S.C.S. §§201-216, 217-219, 557). . . .